

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

DIANE DENMARK,

Plaintiff

v.

LIBERTY MUTUAL ASSURANCE  
COMPANY OF BOSTON, THE GENRAD,  
INC. LONG TERM DISABILITY PLAN,  
THROUGH TERADYNE, INC., AS  
SUCCESSOR FIDUCIARY

Defendants

Civil Action No. 04-12261-DPW

**PLAINTIFF'S MOTION FOR  
FOCUSED PRE-TRIAL DISCOVERY RELATING TO  
THE SCOPE OF THE ADMINISTRATIVE RECORD  
WITH RULE 7.1 CERTIFICATION**

NOW COMES the plaintiff, Diane Denmark ("Denmark"), pursuant to Rule 7(b) of F.R.C.P., Rule 7.1 of the local rules and the Scheduling Order of this Court, plaintiff moves this Court to enter an order permitting the plaintiff to engage in limited and focused pre-trial discovery. In support of this motion, the plaintiff has filed her memorandum herewith and exhibits. The form of a proposed order follows the signature page of this motion.

Denmark filed this action after she was paid short term disability benefits, but denied LTD benefits by Liberty. In her complaint, plaintiff Diane Denmark ("Denmark") alleges that she is entitled to relief under 29 U.S.C. § 1132(a)(1)(B) ("ERISA"), and more specifically that Liberty wrongfully denied her claim long-term disability benefits.

The purpose of the motion is to discover, the scope of documents that comprise the administrative record relating to the basis for Liberty Mutual Assurance Company of Boston's

(“Liberty”) for denial of Denmark’s long-term disability benefits (“LTD benefits”).

Denmark seeks to discover claims manuals, instructional and training documents available to Liberty’s claims adjusters. These documents should have been disclosed during the internal appeal process, and should be disclosed as part of the record on review before this Court. The United States Department of Labor regulations require such disclosure, and so does the First Circuit. Glista v. Unum Life Insurance Company of America, F.3d 113, 123 (1<sup>st</sup> Cir. 2004).

Denmark seeks to discover information between Liberty and Network Medical Review / Elite Physician, Ltd (“NMR”). In this instance, Liberty relied on a NMR doctor to support its LTD denial. That doctor, who only reviewed unspecified records, rendered an opinion that conflicted with an examining Independent Medical Examiner doctor who opined that Denmark was occupational disabled, and with the United States Social Security Administration that also found Denmark disabled.

There is substantial reason to believe that NMR does not provide unbiased reviews when retained by insurers, and a number of courts have thus ordered discovery regarding the relationship between NMR and insurers. Darland v. Fortis Benefits Ins. Co., 317 F.3d 516, 527-531 (6<sup>th</sup> Cir. 2003); Ladd v. ITT Corp., 148 F.3d 753 (7th Cir. 1998). Liberty has represented to Denmark that some of her medical records were reviewed by an “independent” doctor and that he concluded she was not disabled, and thus she was not entitled to LTD benefits.

### **THE DISCOVERY SOUGHT**

Denmark seeks very limited discovery set out below.

### **DOCUMENT DISCOVERY**

1. The Plaintiff requests that the Liberty produce all claims manuals, instructional and training documents available to Liberty's claims adjusters from October 3, 2001 (the date that Denmark sought benefits) through August 23, 2004(the date Liberty contended it had produced all relevant records).
2. The Plaintiff requests that Liberty produce the following documents pertaining to its relationship with Network Medical Review - Elite Physicians, Ltd. ("NMR") from January 1, 2002 to the present:
  - a. IRS 1099 form(s) regarding compensation paid by Liberty to NMR;
  - b. Instructions provided by NMR to its participating physicians concerning writing reports concerning insurance claimants;
  - c. Correspondence between Liberty and NMR concerning Denmark.

### **INTERROGATORY**

Please state the number of files that Liberty and its affiliated companies have referred to NMR and NMR's affiliated companies or entities, including Elite Physicians Ltd., by year, how much Liberty and its affiliated companies pay for a review, and how much in total, by year, Liberty and its affiliated companies have paid to NMR and NMR's affiliated companies or entities, including Elite Physicians Ltd.

**RULE 7.1 CERTIFICATION**

**Plaintiff's counsel certifies that he conferred with attorney Richard Paterniti who represents all defendants in this matter, before the scheduling conference of December 9, 2004, and after the scheduling conference, advising that the plaintiff wanted to take limited discovery. Defendants' counsel would not agree to the plaintiff taking any discovery.**

DIANE DENMARK

/s/ Jonathan M. Feigenbaum

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Jonathan M. Feigenbaum, Esq.  
B.B.O. #546686  
Philips & Angley  
One Bowdoin Square  
Boston, MA 02114  
Tel. No. : (617) 367-8787

Date: January 20, 2005

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THE FOREGOING TO ALL PARTIES OR THEIR COUNSEL OF RECORD THIS DAY BY MAIL DELIVERY  
/s/ JONATHAN M. FEIGENBAUM, ESQ

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JONATHAN M. FEIGENBAUM, ESQ.  
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Defendants

**ORDER ON  
PLAINTIFF'S MOTION FOR  
FOCUSED PRE-TRIAL DISCOVERY RELATING TO  
THE SCOPE OF THE ADMINISTRATIVE RECORD**

After reviewing the motion of the plaintiff and the opposition of the defendants, for good causes shown,

and based on part on Glista v. Unum Life Insurance Company of America, F.3d 113, 123 (1<sup>st</sup> Cir. 2004),

the defendant Liberty Mutual Assurance Company of Boston, is hereby ORDERED to respond to the document requests 1 and 2 set out below, and the interrogatory set out below no later than February 11, 2005, and to produce responsive documents by February 11, 2005.

**DOCUMENTS SOUGHT**

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DATED this Day of 2005, in this Judicial District.

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DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT COURT JUDGE